UNITED STATES COURT OF MILITARY COMMISSION REVIEW
en banc

UNITED STATES, *Appellee*, *v*. ALI HAMZA AHMAD SULIMAN AL BAHLUL, *Appellant*.	CMCR CASE NOS. 09-001, 16-002 Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October – 3 November 2008 Before a Military Commission convened by Hon. Susan Crawford Presiding Military Judge Colonel Peter Brownback, USA (Ret.) Colonel Ronald Gregory, USAF 9 February 2018

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Appellee claims that Appellant is asking this Court to "ignore the extensive appellate history and to review this case anew, as if it were on its initial appeal." Resp. 14. Nothing could be further from the truth. Appellant's only argument is that given this case's extensive appellate history, which significantly clarified the governing law since the initial appeal, this Court simply must do its statutory duty to ensure that the judgment is, in fact, "correct in law and fact."

Based on 1) the mandate rule, 2) the law of the case doctrine, and 3) the harmless error rule, Appellee asks this Court to ignore its duty, to sign-off on Appellant's stand-alone conspiracy conviction, and affirm the imposition of a life sentence "even if this Court thinks the earlier U.S.C.M.C.R. decision is wrongly decided." Resp. 17. None of these procedural rules require such extreme indifference to the law. Under Circuit precedent, the mandate rule does not apply because the lingering ex post facto and jurisdictional questions with stand-alone conspiracy charges were not answered at all, let alone "cleanly." Equally, the law of the case doctrine does not require this Court to affirm on the basis of its 2011 opinion; an opinion that no one, not even Appellee, believes remains correct. And finally, as the Circuit held, the ex post facto and jurisdictional defects presented here prejudice Appellant's "substantial rights," meaning that the errors cannot be harmless.

Should this Court determine that it is precluded from correcting a judgment that is incorrect in law and fact, Appellant's sentence on the sole remaining charge should be brought into line with the average sentence imposed in the military commission system. That is the only way that this Court can assure itself that it has removed the taint of two out of three constitutionally invalid convictions.

I. THE INVALIDITY OF APPELLANT'S CONSPIRACY CONVICTION CANNOT BE IGNORED VIA THE MANDATE RULE.

Appellee's primary argument for why this Court should ignore the invalidity of Appellant's remaining conviction is the "mandate rule." Because this Court affirmed his stand-alone conspiracy conviction in 2011 and because the Circuit affirmed, albeit for different reasons, Appellee insists that his conspiracy conviction is set in stone, no matter how erroneous it may be.[1] This is not the law.

The mandate rule "states that a district court is bound by the mandate of a federal appellate court and generally may not reconsider issues *decided* on a previous appeal." *Dep't of Labor v. Insurance Co. of North America*, 131 F.3d 1037, 1041 (D.C. Cir. 1997) (emphasis added). A specific application of the law of the case doctrine, its reach "is limited to issues that were decided either explicitly or by necessary implication – the mere fact that an issue could have been decided is not sufficient to foreclose the issue on remand." *Ibid.* (internal formatting omitted). This Court must therefore "look to [the Circuit's] previous opinion" to ascertain the question(s) the Circuit actually decided. *Ibid*; *see also Maggard v. O'Connell*, 703 F.2d 1284, 1289 (D.C. Cir. 1983) ("[I]n deciding what, if any, issues have been foreclosed by the previous appeal, the focus is wholly on the prior opinion of [the] court."). If the Circuit's opinion(s) rested on the resolution of "a narrow question," this Court on remand may not "read this holding more

[1] Appellee seems to argue that 10 U.S.C. § 950j, and in particular its use of the words "final and conclusive," somehow creates a statutory constraint on to this Court's jurisdiction on remand. The basis for this argument is unclear from the pleadings and is not supported by any case law or legislative history. The relevant text from §950j is functionally identical to UCMJ Article 76, 10 U.S.C. § 876, and is simply a codification of *res judicata*. *See Schlesinger v. Councilman*, 420 U.S. 738, 749 (1975). This provision, in short, says nothing about this Court's scope of review either on direct review or on remand.

broadly" to preclude it from resolving questions that the Circuit either refused or failed to answer. *Insurance Co. of North America*, 131 F.3d at 1041; *see also City of Cleveland, Ohio v. Fed. Power Comm'n*, 561 F.2d 344, 348 (D.C. Cir. 1977) (the mandate rule "does not apply to points not decided on a previous appeal, even though they then could have been."). Hence, this Court not only can, but must, decide for itself any issue that was not "cleanly" decided by the Circuit, "uncluttered by other claims." *Independent Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001).

Whatever else can be said of the Circuit's fifteen orders and opinions, no one can say that they decided the legality of Appellant's stand-alone conspiracy conviction "cleanly." With respect to his ex post facto claim, all the Circuit determined for sure was that the plain error rule applied to *its* (but not this Court's) review of ex post facto issues, that Appellant's material support and solicitation convictions were plain ex post facto violations, and that his stand-alone conspiracy conviction was not a plain ex post facto violation at the time of the Court's 2014 decision. Judges Kavanaugh and Brown both complained that this left "the government without any definitive answers." *Bahlul v. United States*, 757 F.3d 1, 62 (D.C. Cir. 2014) (Brown, J.); *id.* at 78 (Kavanaugh, J.) ("We took this case en banc specifically to decide whether, consistent with the Ex Post Facto Clause, a military commission could try conspiracy for conduct that occurred before the 2006 Act. Yet the majority opinion does not actually decide that question.").

On the question of what subject-matter jurisdiction may be lawfully given to military commissions, there was no opinion from which this Court can ascertain a mandate on any question. As Judge Kavanaugh lamented the failure to reach a result left "other cases in the pipeline … [without] a clear answer to the question. … It is long past time for us to resolve the issue squarely and definitively." *Bahlul v. United States*, 840 F.3d 757, 760 (D.C. Cir. 2016)

(Kavanaugh, J.); *see also id*. at 838 (Joint Dissent) ("Today's decision thus provides no precedential value for the government's efforts to divert the trial of conspiracy or any other purely domestic crime to law-of-war military commissions.").

There was, in short, no "last word" on either of the issues presented here because for procedural reasons unique to the Circuit, there was no word at all. As a consequence, the Circuit has given this Court no mandate from which to conclude that Appellant's conviction is correct in law. That is a question that this Court must decide for itself.

If anything, it is Appellee who is seeking to have this Court "ignore the mandate of that superior court." Resp. 18. Even if this Court confines itself to the Circuit's 2014 order, this Court was ordered "to determine the effect, if any, of the two vacaturs on sentencing." *Bahlul*, 757 F.3d at 31. This Court is therefore ***required*** to reevaluate Appellant's sentence. But nothing in that order circumscribes this Court's scope of review, either explicitly or by necessary implication. Nor does it compel this Court to blind itself to the fact the that principal "effect of the two vacaturs" was to create significant doubt over whether Appellant's stand-alone conspiracy conviction remained "correct in law and fact" and "on the basis of the entire record, should be approved." 10 U.S.C. § 950f(d).

While there might be law of the case grounds for precluding the relitigation of other legal questions that this Court settled in its 2011 decision, discussed below, nothing in the Circuit's opinions or order "cleanly" answered the two questions presented here. Those questions go to the core of whether his conviction and sentence is correct in law and fact. And they have become all the more substantial precisely because of the Circuit's opinions vacating – on plain error review – his convictions for solicitation and providing material support to a terrorist organization.

In fact, even Appellee is forced to acknowledge (albeit in a footnote) that the Circuit's remand cannot be reasonably construed to preclude this Court's review of the findings entirely. Resp. 13 n.44. Appellee concedes that Appellant's stand-alone conspiracy conviction rests in part on the object offense of material support for terrorism and that this aspect of his conviction is necessarily invalid under the "subsequent holdings of the Court of Appeals [which] held that material support for terrorism was not an established war crime at the time of Appellant's actions." *Ibid*.

The Circuit, however, says nothing about this aspect of the conspiracy charge. If Appellee's version of the mandate rule is correct, this Court must sentence a man based in part upon a judgment that no one, not even Appellees, believes is valid under current law. *See In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000). Nothing in the statute or the mandate rule compels such an absurdly legalistic exercise. The mandate rule, like the law of the case doctrine, is "discretionary, not mandatory." *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1544 (10th Cir. 1996). It affords this Court no excuse to pretend that its hands are tied.

Appellee, for its part, neither cites nor distinguishes the Circuit's major precedents on the mandate rule. Instead, it asks this Court to adopt the reasoning of an NCMR case from 1977, which Appellee asserts creates a strict, even jurisdictional, limit on this Court's review on remand. *United States v. Reed*, 1 M.J. 1114 (N.C.M.R. 1977); Resp. 17. In *Reed*, appellants were convicted pursuant to their pleas of robbery, kidnapping, and conspiracy. The CMA vacated their convictions on the substantive counts but left their conspiracy convictions in place and remanded for resentencing. On remand, the appellants argued – for the first time – that their pleas were improvident. The NCMR reasoned that the affirmance of the conspiracy charges by the CMA rendered their convictions final and therefore unreviewable any further. Superficially, therefore,

the NCMR's decision in *Reed* does support Appellee's argument. But what Appellee fails to mention is that the CMA subsequently granted review again. *United States v. Hedlund*, 7 M.J. 271 (C.M.A. 1979). It then reached the precise claim that the NCMR had held was procedurally barred by the convictions' supposed "finality" and affirmed on the merits, finding that appellants' pleas were, in fact, provident.

The standard rule in the military justice system is that the "terms of the mandate may establish a particular matter as the 'law of the case,'" thereby compelling the lower court to "action that conforms to the limitations and conditions prescribed by the remand." *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989) (internal quotations omitted); *see also United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985). But that is not what we have in this case. Neither the Circuit's orders nor its opinions establish any controlling "law of the case" on the issues presented. And despite the arguably greater strictness of remands in the military justice system, CAAF has repeatedly corrected the CCAs when they have curtailed their review on remand when not compelled to do so by the express terms of a remand order. The procedural history in *United States v. Rose*, 71 M.J. 138, 144 (C.A.A.F. 2012), while somewhat convoluted, provides a clear example of this in practice.

That said, to the extent this Court is faced with a choice between the standard applied in the federal courts and an arguably stricter standard applied in the military justice system, the weight of authority favors this Court's adopting the rule that operates "in harmony with that of our superior court and inflicts no substantial prejudice to the conduct of military commission trials." *United States v. Al-Nashiri*, 62 F. Supp. 3d 1305, 1312 (U.S.C.M.C.R. 2014). The stricter mandate rule in the military justice system stems from the need to exercise "control over inferior tribunals or authorities," *Montesinos*, 28 M.J. at 44, which arises from the fact that the judgments

of its appellate courts are "are 'not self-executing.' The court issues no mandate, but its decision is forwarded to the convening authority for further action." *United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997) (internal quotations omitted). The decisions of this Court and the D.C. Circuit, by contrast, are self-executing and it is the D.C. Circuit whose mandate is under review here. The Circuit remanded to this Court against the background of cases like *Babbitt* and *Insurance Co. of North America*. And under those cases, the expectation is that any questions that it had not "cleanly" answered remain within the purview of this Court.

Finally, settled principles of administrative law strongly disfavor the diminished role for this Court that Appellee advocates. Unlike the CAAF's review of the CCAs or even the Circuit's review of the district courts, the Circuit's review of this Court's decisions is governed by the rules of applicable to specialized agency adjudication. While this Court is not an administrative agency, Congress followed the administrative law model and provided that the Circuit should review this Court's decisions, not as appeals from conviction under Fed. R. App. Pro. 4, but via petitions for review under Fed. R. App. Pro. 15(a). 10 U.S.C. § 950g(c). That is significant because "the basic legal principles that govern remand" in the Rule 15 context favor a broad scope of review on remand to answer those questions the Circuit could not. *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002).

As Appellant noted in his opening brief, this Court is an Article I court with "exclusive jurisdiction over these cases," which makes it "better able" than the Circuit to decide legal questions whose primary, if not sole, significance is to the military commission system as a whole. *See Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); *see also United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999) (Article I court's special "expertise ... guides it in making complex determinations in a specialized area of the law"). The Circuit itself has recognized this

Court's "special expertise in addressing questions related to the laws of war." *In re Al-Nashiri*, 835 F.3d 110, 127 (D.C. Cir. 2016).

When the Circuit remands a case to this Court, therefore, the expectation is that this Court "can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination [of the unresolved legal questions presented]; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether [this Court's] decision exceeds the leeway that the law provides." *Orlando Ventura*, 537 U.S. at 16. Consequently, under settled principles of administrative law, it is "error" to treat the Circuit's remand of one question from a petition for review as preclusive of other questions that are properly presented solely because the Circuit had "not specifically directed" review of those questions. *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 166 (D.C. Cir. 2014).

II. THE INVALIDITY OF APPELLANT'S CONSPIRACY CONVICTION CANNOT BE IGNORED VIA THE LAW OF THE CASE DOCTRINE.

Appellee also attempts to discourage this Court from reviewing the judgment in this case based on the law of the case doctrine. Resp. 24. In support of this claim, it argues that the Circuit provided the "last word on this subject." *Ibid*.

As an initial matter, Appellee appears to be confusing the law of the case doctrine with the mandate rule. The mandate rule is a "more powerful version" of the law of the case doctrine, rooted in axiom that "an inferior court has no power or authority to deviate from the mandate issued by an appellate Court." *Babbitt*, 235 F.3d at 596 (internal quotations omitted). For the reasons stated above, the mandate rule does not preclude this Court's ensuring that its judgments are correct in law and fact because the Circuit did not "cleanly" reach the issues presented, meaning that there is no law of the case from the Circuit.

The ordinary law of the case doctrine, by contrast, only matters if this Court determines that its own decision from 2011 remains good law *and* that it is in the interests of justice to reaffirm it as such. This is because it "has always been recognized that the 'law of the case' is a doctrine of 'judicial administration' that does not limit the power of the appellate court." *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 279 (D.C. Cir. 1971); *see also United States v. Parker*, 62 M.J. 459, 464-65 (C.A.A.F. 2006) ("The law-of-the-case doctrine, however, is a matter of appellate policy, not a binding legal doctrine.") (internal quotations omitted). "The doctrine is not a jurisdictional limitation; rather, it 'merely expresses the practice of courts generally to refuse to reopen what has been decided[.]'" *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1134 (D.C. Cir. 1994) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). It always remains within this Court's discretion, in other words, to revisit the wisdom and propriety of its earlier decisions.

To be sure, the relitigation of most of the issues previously decided by this Court would be incompatible with the law of the case doctrine. Were Appellant to challenge this Court's earlier conclusions on the Bill of Attainder Clause, for example, he would simply be relitigating decided issues. Similarly, though the Circuit did not resolve his First Amendment and Equal Protection claims "cleanly" for mandate rule purposes, no change in circumstances warrant this Court's reviewing them again.

The ex post facto and jurisdictional defects with Appellant's stand-alone conspiracy conviction stand in clear contrast, however. With respect to these two claims, it would be an abuse of discretion for this Court to *not* revisit its 2011 decision because the law of the case doctrine never applies where "there has been an intervening change of controlling law, or new

evidence has surfaced, or the previous disposition has resulted in clear error or manifest injustice." *Cannabis Therapeutics*, 15 F.3d at 1134.

As explained in Appellant's merits brief, there have been at least three significant changes in the legal landscape since this Court's 2011 decision: 1) Appellee and the Circuit alike rejected this Court's legal rationale for upholding conspiracy as a war crime under international law; 2) the en banc Circuit unanimously held that Appellant's solicitation and material support convictions constitute plain ex post facto violations for reasons that render his stand-alone conspiracy conviction invalid if de novo review is applied; and 3) there has been a wealth of deep scholarship, reflected in documents such as the Martins Memo, which now affords this Court with the benefit of a vast body law, analysis, and historical precedent built up over nine years of post-trial litigation that was simply not available to itmin 2011. Br. 19-23.

Appellee's startling claim that this Court must summarily affirm "even if this Court thinks the earlier U.S.C.M.C.R. decision is wrongly decided," Resp. 17, is therefore as profoundly wrong as it is troublingly indifferent to this Court's mandate to do justice and responsibility to correct a decision that is already injecting error into pending cases at the trial-level. Br. 23. As the Circuit did in cases like *Irons v. Diamond*, 670 F.2d 265 (D.C. Cir. 1981), this Court should not hide behind the law of the case doctrine for "[w]hile this path would lead us out of the present thicket, it would do little if anything to cut away the tangled legal underbrush and clarify the controlling law of this circuit." *Id.* at 286. This Court should not privilege Appellee's bare desire to score a win in the case of a Low-Value Detainee above the value of a durable decision on these issues to the military commission system, the viability of the High-Value Detainee cases currently pending, and this nation's longstanding commitment to the rule of law in even those cases for which it is most tempting to put expediency above justice.

III. THE INVALIDITY OF APPELLANT'S CONSPIRACY CONVICTION CANNOT BE IGNORED VIA THE HARMLESS ERROR RULE.

Appellee also claims that this Court should affirm even if Appellant's charge of conviction is legally invalid because under 10 U.S.C. § 950a(a), a "finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Resp. 27. In other words, even if this Court finds that the offense the government charged, the military judge instructed, and the members found was invalid, Appellant's conviction for that offense should be affirmed because Appellee might be able to convict him of another offense entirely. This is wrong for at least two dispositive reasons.

First, for all of Appellee's emphasis of the mandate rule, the Circuit vacated Appellant's solicitation and material support convictions under plain error review. *Bahlul*, 757 F.3d at 29-31. The third prong of the plain error analysis is that the error "affects [the appellant's] substantial rights." *United States v. Olano*, 507 U.S. 725, 732 (1993). It is difficult to see how convicting a man before a military commission of crimes that were not, in fact, crimes triable by military commission could be anything but a gross violation of his "substantial rights." But even if it were a debatable point, the Circuit squarely "decided either explicitly or by necessary implication" this issue and Appellee has offered this Court no reason to vary from that conclusion. *Insurance Co. of North America*, 131 F.3d at 1041.

Second, §950a(a) is carried over from UCMJ, art. 59(a), which itself is just a codification of the harmless error rule. *See, e.g.*, *United States v. Woods*, 8 C.M.R. 3, 6 (C.M.A. 1953). Even if the errors asserted here could be somehow described as harmless in any case, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was

harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Appellee therefore bears the burden of proving to this Court beyond a reasonable doubt that the members would have convicted Appellant had he been charged with substantive offenses. And we know that Appellee cannot meet this burden because when its own counsel, the then-Acting Solicitor General, was asked whether it even had the evidence to prove Appellant's involvement in a completed crime, the Solicitor General confessed, "I don't know." *Bahlul v. United States*, Case No. 11-1324, Argument Transcript 46-47 (D.C. Cir., Dec. 1, 2015).[2] If Appellee's own attorneys do not know, this Court does not know. And if the Solicitor General has doubts, then there is no basis for this Court to be sure beyond a reasonable doubt.

IV. APPELLANT'S CONSPIRACY CONVICTION IS INCORRECT IN LAW.

Appellant's primary argument on the ex post facto clause is that his stand-alone conspiracy charge was not within the scope of UCMJ, art. 21, and therefore not triable by military commission prior to 2006. Br. 24-25. Alternatively, he argued that because stand-alone conspiracy is not an offense under the law of war and because it is also an infamous crime, it is outside military commissions' lawful subject-matter jurisdiction under *Ex parte Quirin*, 317 U.S. 1, 29 (1942). Br. 25-30.

In support of these arguments, Appellant offered this Court an unbroken line of authority interpreting war crimes jurisdiction as a "branch of international law." Br. 25-28. He offered this Court Appellee's concession, made subsequent and contrary to this Court's 2011 decision, that conspiracy is not an offense under international law. Br. 28. And he offered this Court a vast body of precedent, showing that conspiracy has not been used to prosecute foreign nationals for

[2] https://goo.gl/Fcphcf.

war crimes committed abroad. Br. 34-37. To the extent conspiracy-like liability has ever been used, Appellant showed that those precedents were distinguishable for the reasons BG Mark Martins, USA, argued in his 2013 memorandum; to wit, conspiracy was used as a "theory of liability resting upon the accused's alleged participation in a common plan to carry out the completed crimes." BG Mark Martins, Memorandum for the Convening Authority ¶4(c) (6 Jan. 2013); Br. 42. Taken together, there is no basis for this Court to conclude that Appellant's stand-alone conspiracy conviction is correct in law and fact.

Appellee's brief suggests that its views on these basic merits questions are not that different from Appellant's. Appellee does not claim that stand-alone conspiracy is triable as an inchoate offense. Instead, Appellee puts its primary reliance on Judge Wilkins' separate opinion and specifically the argument that "Appellant's conduct in furtherance of the conspiracy … met[] the requirements of joint criminal enterprise liability or *Pinkerton* co-conspirator liability for the substantive offenses themselves[.]" Resp. 29. For that reason, Appellee argues that "Appellant's conviction for conspiracy is simply not the inchoate offense that Appellant claims." *Ibid*. The parties therefore appear to be in basic agreement that the Martins Memo and Judge Wilkins opinion get it right on the law: conspiracy charges must prove the accused's personal guilt for a substantive offense. The significant point of disagreement is the facts.

Although the evidence of record has remained static since Appellant's trial in 2008, Appellee's characterization of his culpability has shifted dramatically over time in search of a theory of liability that could withstand appellate review. At trial, the prosecution described Appellant as a low-level technician to a terrorist organization, whose first job was to collect press clippings for Usama bin Laden, Tr. 507-08, who then spent six months helping to edit the USS COLE video, Tr. 549; Pros. Ex. 5 at 5, who graduated to doing secretarial duties on public

relations matters, Tr. 508; Pros. Ex. 5 at 6, and who briefly traveled in bin Laden's entourage after September 11th, principally to provide tech support. Tr. 555-56; Pros. Ex. 5 at 6-7.

The stand-alone conspiracy charge that the prosecution proved at trial was, as this Court recognized in its previous decision, substantively indistinguishable from the charge that Appellant provided support to a terrorist organization. *United States v. Bahlul*, 820 F.Supp.2d 1114, 1222-23, 1225 (U.S.C.M.C.R 2011). The prosecution even went so far as to strike language from the charge sheet that had alleged Appellant "join[ed] al Qaeda, an enterprise of persons who shared a common criminal purpose, that involved, at least in part, the commission or intended commission of [a war crime]." App. Ex. 1. The prosecution did this prior to Appellant's entry of his pleas for the stated purpose of "reduce[ing] the offense." Tr. 113. The military judge instructed the members only on the stand-alone, inchoate crime of conspiracy, stating that "the overt act required for this offense does not have to be a criminal act," and "proof that [any object offenses] actually occurred is not required." Tr. 848. And that is what the members found.

The inchoate nature of Appellant's stand-alone conspiracy conviction was uncontroversial throughout most his post-trial appeal. This Court entitled its analysis of the charges against him with the heading "International Law and Inchoate Liability." *Bahlul*, 820 F.Supp.2d at 1233. In conceding that the Circuit's decision in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) ("*Hamdan II*"), required the vacatur of Appellant's convictions on all counts, Appellee conceded that although "the *Hamdan II* Court did not address whether the inchoate conspiracy and solicitation counts on which [Appellant] was also convicted constituted violations of the international law of war, the government acknowledged in its opening brief that neither conspiracy nor solicitation has attained international recognition at this time as an offense

under customary international law." *Bahlul v. United States*, Case No. 11-1324, Gov't Supplemental Brief 3 (D.C. Cir., Jan. 9, 2013). And, as noted above, when pressed at oral argument as recently as 2015 on whether the government actually had evidence to prove Appellant's guilt for any completed crime, the Solicitor General conceded, "I don't know."

In asking this Court to now affirm on the basis of Appellant's supposed liability for substantive crimes, Appellee fights the record at every turn. It states for example that "there was important testimony regarding his 'foreknowledge' regarding a major attack." Resp. 11. But if one actually inspects Appellee's footnotes, one sees that the only citation supposedly supporting this proposition is a snippet of testimony of the prosecution's so-called "propaganda expert," an expert witness who had no first-hand knowledge of Appellant at all. The prosecution's fact witnesses, who interrogated Appellant, uniformly testified that he was only a "media man" with no role in planning any terrorist attack, not the least the September 11th attacks. Tr. 508-09; 567; 585-86. And the uncontested evidence showed that he had no role in or foreknowledge of any terrorist operations. Pros. Ex. 9 at 2; Pros. Ex. 13 at 2; *id.* at 3.[3]

Appellee now claims, preposterously, that Appellant "was among the leaders of al Qaeda." Resp. 4. There is nothing in the record to support this other than the awkward translation of a vague remark that Appellant made under the stress of his sentencing hearing. Appellant appears nowhere in the 9/11 COMMISSION REPORT and, unlike other defendants to have been

[3] Latching onto a poorly-translated letter Appellant wrote to *introduce* himself to some al Qaeda leaders in 2005, Appellee has also claimed that Appellant "prepared" martyr wills for some of the September 11th hijackers. The letter itself shows Appellant claiming to have "typed" or "transcribed" (طبع) them after the September 11th attacks. Pros. Ex. 15 at 1& 4-5.; *see also* Tr. 586. Appellee also claims that he "arranged" for these individuals to join al Qaeda, based upon Appellant's passing interaction with these individuals at a guesthouse when all of the relevant evidence, including the 9/11 COMMISSION REPORT, shows that they were already members of al Qaeda. 9/11 COMMISSION REPORT 165-67 (2004).

before this Court, he appears nowhere on al Qaeda's infamous member list. *See Members Only: Al Qaeda's Charter List Revealed after 13 Years in US Hands*, JUST SECURITY (Jan. 29, 2015).[4] No witness or interrogation records from the hundreds of detainees held in Guantanamo support this. And Appellant's interrogators all testified that he was a bombastic but nevertheless low-level technician in the organization befitting his detention status as a Low-Value Detainee. In fact, the most Appellee can muster to describe Appellant's role with particularity was that he was a "media technician," who was given a laptop to do assigned tasks. Resp. 12.

While Judges Millet and Wilkins were apparently persuaded to view the evidence against Appellant in the exaggerated light that Appellee now asks this Court to accept, "seven members of [the Circuit] recognize[d], [Appellant] was charged with, tried for, and convicted of the standalone crime of conspiracy." *Bahlul*, 840 F.3d at 831 (Joint Dissent). Not until the weakness of its legal theories become plain did Appellee ever dispute the inchoate nature of Appellant's stand-alone conspiracy conviction or his marginal role before his capture.

This Court should, therefore, vacate Appellant's conviction. If Appellee believes that it can convict Appellant of a substantive crime, vacating his conviction will give it the opportunity to muster its evidence, provide him notice of the charges, and attempt to persuade a panel of members beyond a reasonable doubt. This Court, however, should not distort the law to save a conviction that is otherwise unsustainable. Appellant's stand-alone conspiracy conviction should therefore be vacated as incorrect in law and fact.

[4] https://www.justsecurity.org/19484/al-qaeda-member-number/

V. EVEN IF THIS COURT AFFIRMS, APPELLANT'S SENTENCE SHOULD BE BROUGHT INTO LINE WITH OTHER SIMILARLY-SITUATED MILITARY COMMISSION DEFENDANTS.

As explained in Appellant's brief, the prosecution's "central charge" has been vacated, Br. 54-55, and this Court's 2011 decision largely rested on the conclusion that his conspiracy conviction was supported by the now-vacated material support charge. *Bahlul*, 820 F.Supp.2d at1222-23, 1225. Appellee's main argument against providing Appellant sentencing relief rests on its characterization of *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013), from which it argues that his sentence should remain the same because "his maximum penalty did not change." Resp. 21.

This argument makes no sense in the military commission context. By statute, sentencing for nearly every offense is indefinite. 10 U.S.C. § 950t. If death is not authorized, the maximum penalty is always life. Appellee's argument would therefore lead to the conclusion that an appellant convicted of Taking Hostages, Torture, and Wrongfully Aiding the Enemy, who then had all but the last charge thrown out on appeal, is ineligible for resentencing because the maximum penalty remained whatever "a military commission under this chapter may direct."

Neither common sense nor *Winckelmann* compel this result. Indeed, the vacatur of some of the charges in *Winckelmann* prompted sentence reduction from thirty-one (31) to eleven (11) years. *Winckelmann*, 73 M.J. at 13. And *Winckelmann* was not even a constitutional case, where the courts have a heightened duty to cleanse the sentence of the taint of erroneous convictions. *Baber v. United States*, 324 F.2d 390, 394 (D.C. Cir. 1963). This Court should, therefore, follow *Winckelmann*'s actual example and ensure "the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *Suzuki*, 20 M.J. at 249.

As noted in Appellant's opening brief, the average sentence in the military commission system, including for homicide convictions, is 10.25 years. Br. 54. In the federal system, the average sentence is 16.5 years for comparable conduct to that charged here (to wit, providing support to a foreign terrorist organization) and 16.75 years for knowingly supporting the perpetration of a terrorist attack. Br. 56. Bringing Appellant's sentence in line with the military commission average or, for that matter, the sentence reduction in *Winckelmann* will ensure the sentence is "correct in law and fact" and "on the basis of the entire record, should be approved." 10 U.S.C. § 950f(d).

Appellee claims that resentencing is unnecessary because "the same conduct by the Appellant supported all three charges." Resp. 15. But if that is true, Appellee is confessing a far more significant error. If the stand-alone conspiracy charge is substantively indistinguishable from two charges that have been now vacated, how can Appellant be sentenced at all on such a charge? Or if the now-vacated charges were wholly redundant, Appellee would seem to be admitting that it unreasonably multiplied the charges, which itself would be reversible error. *United States v. Quiroz*, 55 M.J. 334, 336-37 (C.A.A.F. 2001).

Finally, despite Appellee's assertions to the contrary, the past decade has shown a "dramatic change in the penalty landscape or exposure" that Appellant faces. Resp. 23. Appellant's life sentence has been uniquely severe due to the peculiar logistics and politics of Guantanamo that were not foreseen in 2008. Given this Court's "sweeping Congressional mandate to ensure a fair and just punishment for every accused," *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotes and citations omitted), it cannot ignore the reality of what Appellant's life sentence has proven itself to actually mean.

When this Court first passed upon the appropriateness of his life sentence for all three charges, the government insisted that:

> Appellant was sentenced to be confined for life, R. 922, not to confinement for life *without parole*, as argued in Appellant's Corrected Supplemental Brief on Sentence appropriateness …. That a formal system of post-conviction clemency and parole has not yet been established for prisoners serving military commission sentences does not deprive the President of his authority to grant clemency or parole to Appellant. Further, nothing in the MCA prevents development of a clemency and parole system – the analogous court-martial clemency and parole system is largely a regulatory creation – and both common sense and the needs of detention facility management suggest such a system is likely to formalize in time.

United States v. Bahlul, Case No. 09-001, Appellee's Supplemental Brief on Sentence Appropriateness, at 3 (9 Nov. 2009) (original emphasis).

The past decade has shown, however, that neither common sense nor the needs of detention facility management have prevailed. No parole system for military commission defendants has been created and there is no indication such a system will ever be implemented. Instead, the only parole regime under which a Guantanamo prisoners' continued detention in light of their future dangerousness may be reviewed is the system Periodic Review Boards, which evaluate whether the individual poses "a continuing significant threat to the security of the United States" based upon his pre-capture conduct, his propensity to re-offend, as well as his "behavior, habits, traits, rehabilitation efforts, and whether the detainee was considered a danger to other detainees or other individuals." Policy Memorandum, *Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567*, Attachment 3 § 3 (Mar. 28, 2017).[5] So long as Appellant is serving a military commission sentence, he is

[5] http://www.prs.mil/Portals/60/Documents/2017_PRB_Policy_Memo_Signed.pdf.

precluded from demonstrating his capacity to change and his willingness to live a peaceful life moving forward. E.O. 13567, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed. Reg. 13277 § 1(a) (Mar. 7, 2011).

The alternative, life without parole, "is the second most severe penalty permitted by law." *Harmelin v. Michigan,* 501 U.S. 957, 1001 (1991) (Kennedy, J. concurring). It is typically reserved for the most violent offenders and recidivists with a history of serious and violent crime. *See Ewing v. California*, 538 U.S. 11, 25 (2003); *Solem v. Helm*, 463 U.S. 277, 292-93 (1983). Whatever moral opprobrium Appellant's past behavior may inspire, he has a clean detention record with no history of violence or disorder. He was neither charged with nor convicted of a completed crime, nor shown to have had any foreknowledge of one. And his role in the organization whose terrorist activity he is alleged to have supported was peripheral and short-lived. Foreclosing the possibility of Appellant's future rehabilitation is neither just nor sensible.

The other "dramatic change" in the punishment landscape, and one of the principal reasons a parole system is unlikely to ever be created, is the vanishingly small number of cases that have been and will ultimately be tried in the military commissions. At the time this case was previously briefed to this Court, there were 241 prisoners in Guantanamo, 44 of whom were referred for future prosecution. Final Report, Guantanamo Review Task Force (Jan. 22, 2010).[6] Reality has proven to be different. Only 41 prisoners remain in Guantanamo. Only five men have gone through the military commission system since that time, all via plea bargains for release. Ten are currently charged; all of whom are so-called "High-Value Detainees," who by virtue of

[6] https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf

their prior custody in the CIA's Rendition, Detention, and Interrogation Program, are held in a separate facility.

The effect of this low throughput has been that Appellant, as a Low-Value Detainee, has been the *only* convict in Guantanamo for most of the past decade. And as a result of a JTF-GTMO policy of segregating post-trial detainees from the general population, Appellant has spent the vast majority of that time in solitary confinement. While his conditions have varied, this has included years of isolation in Camp Echo, a system of freestanding modular cells, and in Camp 6, in which he was isolated in a cell within a larger, two-story cell-block that was itself entirely empty.

As early as 1890, the Supreme Court recognized that solitary confinement was a uniquely severe form of punishment. *See In re Medley*, 134 U.S. 160 (1890). The Court deemed it well established in the mental health literature of the time that prolonged periods of solitary confinement lead to increasingly debilitating long-term psycho-social impairments. *Id*. at 168 ("A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community."). One hundred and twenty years later, mental health research has only bolstered the Court's conclusions. Scientific research has demonstrated that prolonged solitary confinement can lead to severe mental suffering and permanent harm.[7]

[7] *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 J. OF L. & POLICY 325, 382-83 (2006); *see also* Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 42 CRIME & DELINQUENCY 124, 140 (2003); Patricia B. Sutker et al., *Cognitive Deficits and Psychopathology Among Former Prisoners of War and Combat Veterans of the Korean Conflict*, 148 AM. J OF PSYCHIATRY 67 (1991).

In fairness to the government, no one foresaw that Appellant's confinement would involve such protracted periods of solitary confinement at the time he was sentenced. But that fact also cuts the other way. Neither the prosecution nor the members of Appellant's military commission contemplated, let alone affirmatively chose to impose, a sentence of such severity. As the Supreme Court recognized in *Medley*, the imposition of a solitary confinement is different in kind than the imposition of an ordinary term of imprisonment. Solitary confinement is "an additional punishment of the most important and painful character." *Medley*, 134 U.S. at 171. Given that Appellant's sentence has been far more severe than anyone predicted, this Court should adjust Appellant's to the military commission average going forward.

CONCLUSION

For the foregoing reasons, this Court should vacate Appellant's invalid conviction for the stand-alone crime of conspiracy. Alternatively, this Court should reduce his sentence to the military commission average. That will ensure that his continued detention is based upon an actual assessment of his future dangerousness and not tainted by an unlawful conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to counsel for the government on the 9th day of February 2018.

Dated: 9 February 2018

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